STATE OF MICHIGAN

COURT OF APPEALS

MARGARET MCCARTHY, Plaintiff-Appellant,	UNPUBLISHED July 1, 2010
v	No. 289014 Macomb Circuit Court
USA CREDIT UNION, Defendant-Appellee.	LC No. 2007-003920-NZ

Before: HOEKSTRA, P.J., and MARKEY and DAVIS, JJ.

PER CURIAM.

In this action for age discrimination and retaliation, plaintiff Margaret McCarthy appeals as of right the trial court's order granting summary disposition under MCR 2.116(C)(10) to defendant USA Credit Union (Credit Union). Because McCarthy presents no direct evidence of age discrimination and fails to create a triable issue that the Credit Union's legitimate reason for her discharge was a pretext for discrimination, and because McCarthy presents no argument supported by legal authority regarding her claim for retaliation, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

McCarthy worked at the Credit Union's Mt. Clemens branch from 1998 until 2005, when she transferred to the Chesterfield branch. Performance reviews show that McCarthy, while at the Mt. Clemens branch, "effective[ly]" and "successful[ly]" performed her job duties. In January 2006, McCarthy was again rated an "effective" or "successful" performer, and she received a promotion and a raise.

In August 2006, Pam Sejnowski became McCarthy's interim supervisor. Sejnowski was training Saundra Cox for the supervisor position. Sejnowski testified that when she arrived at the Chesterfield branch she noticed that McCarthy had a problem with poor behavior. Similarly, Cox testified that it was not long after she arrived at the Chesterfield branch that she concluded that McCarthy was a poor performer.

On October 19, 2006, Sejnowski had a routine "coaching session" with McCarthy. For the session, Sejnowski prepared an outline, and McCarthy admitted that Sejnowski discussed with her the items listed on the outline. The outline stated that McCarthy needed to maintain a positive attitude, work on communication and people skills, lead by example, develop technical knowledge skills, be patient with peers, treat management with respect and trust, and adapt to

change with little skepticism. It also praised McCarthy's product knowledge, loan judgment, and balancing record. McCarthy and Sejnowski signed the outline.

Sejnowski and Cox met with McCarthy on November 8, 2006, because, according to Sejnowski, McCarthy's attitude had not changed. The two women presented McCarthy with a Corrective Action Statement. The Corrective Action Statement stated that McCarthy had recently engaged in disruptive behavior and that two members had recently complained that they were uncomfortable in approaching McCarthy because she gave the impression that she was too busy to help them. McCarthy was instructed "to make immediate behavior improvements toward members," to treat members with professionalism and friendliness, and to conduct herself in a professional manner at all times. She was also warned that failure to comply with the improvement plan would lead to additional discipline or termination. McCarthy did not believe that the criticisms contained in the Corrective Action Statement were justified, and she refused to sign it. She requested a meeting with Jim Kucinski, the Credit Union's Vice President of Human Resources, and Glenda West, the Credit Union's Vice-President of Branches.

According to McCarthy, in either October or November 2006, she had a meeting with Sejnowski, Cox, and Mary Selva, the senior branch representative at the Chesterfield branch. McCarthy testified that at the meeting Cox told her that two members had telephoned with complaints about her, but she denied having problems with any members. When she refused to sign a document presented by Cox, Sejnowski called her an "old bully."[1] Sejnowski also told her that she was "like an alcoholic" and that she needed to admit that she had a problem. According to McCarthy, the three women also made other comments related to her age.

McCarthy met with Kucinski and West in November 2006. According to McCarthy, she told them about the "old bully" and alcoholic comments and that she had been told that she needed to be more energetic, enthusiastic, and aggressive regarding sales. She also told them that she believed she was being "targeted" because of her age, explaining that she was the oldest employee at the Chesterfield branch and that until Cox arrived she had a perfect record.

On January 10, 2007, McCarthy requested another meeting with Kucinski and West. She requested the meeting because Sejnowski and Cox were targeting her; they questioned everything that she did and had made "very unkind and negative" comments to her. McCarthy believed that Sejnowski and Cox were trying "to get rid of" her; she felt that she was being "age discriminated against." Kucinski and West met with McCarthy the next day. McCarthy testified that she told West that she was being targeted by Sejnowski, Cox, and Selva. According to McCarthy, either at this meeting or at the one in November 2006, West responded by saying that what the three women had said about her was true; she was an "old bully" and like an alcoholic. West explained to her that she had never been told such comments before because her previous supervisor was a nonconfrontational person.

McCarthy also testified that after the January 11, 2007 meeting, West came to meet with her alone. West told her that because she was very detailed oriented, she might want to apply for

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[1] Sejnowski denied calling McCarthy an "old bully."

the accounting position that Human Resources had just announced in an e-mail. West never told McCarthy that she was too old to be on the teller line, but said something like "there's going to be a lot more coming down the pike as far as sales and stuff going towards the members and younger people are more energetic."

In February 2007, Cox completed a performance review for the period January 2006 to March 2007 for McCarthy, and admitted that "it was less than satisfactory." For example, the performance review stated that McCarthy "display[ed] inappropriate behavior when a problem arises," "show[ed] an unwillingness to adapt" to change, "question[ed] management's decision and implementation of new policies and procedures," "need[ed] to listen more effectively to what the member requests and needs," "tend[ed] to focus on who to blame [for a mistake] instead of how to prevent this in the future," and "displayed uncomfortable approaches with peers and members." When Cox wrote the review, she had not decided whether McCarthy should be fired. Cox e-mailed the performance review to Sejnowski, because Sejnowski as McCarthy's previous supervisor had a "say so" in the review. Sejnowski informed Cox that she agreed with the review. The two women did not discuss whether the Credit Union should fire McCarthy.

Cox then submitted the performance review to Human Resources. Human Resources never approved the performance review. Rather, Kucinski and West discussed the review with Cox. After Cox and West confirmed that there had been several talks with McCarthy about her performance and behavior, Kucinski asked Cox for her recommendation. Cox replied that she did not believe it was necessary to continue with the review process. Kucinski and West agreed with her. It was decided that the Credit Union would cut its ties with McCarthy.

According to Kucinski and West, the decision to terminate McCarthy's employment was made by Kucinski. Kucinski averred that his decision was based on McCarthy's performance problems, including insubordination and rudeness to coworkers and members. McCarthy's age did not factor into his decision.

On March 5, 2007, Kucinski, in the presence of Cox, told McCarthy that she was fired. He told her that her termination was the result of her poor performance. McCarthy was 53 years old. McCarthy was replaced by Kristin Shanihan, who transferred from the Credit Union's Troy branch. Shanihan was 36 years old.

McCarthy sued the Credit Union in September 2007 for age discrimination and retaliation. The Credit Union moved for summary disposition under MCR 2.116(C)(10) on the two claims. The trial court granted the motion. The trial court held that there was no direct evidence of age discrimination. It concluded that Sejnowski's comment to McCarthy that she was an "old bully" was a stray remark and that, under the totality of the circumstances, West's comment that McCarthy should seek an accounting position was not direct evidence of age bias. The court also held that there was no circumstantial evidence of age discrimination. It concluded that, even though McCarthy was replaced by a younger worker, McCarthy could not establish a prima facie case of discrimination because was she was not qualified for the position. It

explained that McCarthy's most recent reviews showed that she was not meeting the legitimate expectations of the Credit Union. In addition, the trial court concluded that, even if McCarthy established a prima facie case, McCarthy failed to rebut the Credit Union's claim that her poor job performance was the true reason for her termination.[2] The trial court also held that McCarthy could not succeed on her retaliation claim because McCarthy failed to present evidence of a causal connection between any complaint of age discrimination and her termination.

II. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 279; 769 NW2d 234 (2009). Summary disposition is appropriate under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). We must consider the pleadings and the submitted evidence in the light most favorable to the nonmoving party. *Lanigan v Huron Valley Hosp, Inc*, 282 Mich App 558, 563; 766 NW2d 896 (2009).

III. AGE DISCRIMINATION

On appeal, McCarthy argues that the trial court impermissibly accepted as true the facts as presented by the Credit Union. She claims that she presented significant and numerous direct statements by decision makers of age discrimination. She also claims that she presented a prima facie case of age discrimination and rebutted the Credit Union's legitimate reason for her termination.

An employer shall not "[f]ail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of . . . age . . . ." MCL 37.2202(1)(a). A plaintiff may establish intentional age discrimination with either direct or circumstantial evidence. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 132; 666 NW2d 186 (2003); *DeBrow v Century Great Lakes, Inc (After Remand)*, 463 Mich 534, 539; 620 NW2d 836 (2001).

McCarthy claims that Sejnowski's comment to her that she was an "old bully" is direct evidence of intentional discrimination, as is West's affirmance of the "old bully" comment and West's statement that she should consider a job in accounting because she was too old to be behind the teller line. Direct evidence is "evidence which, if believed, requires the conclusion

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[2] The trial court further held that McCarthy could not succeed on her discrimination claim under a disparate impact theory because McCarthy presented no evidence that she was terminated for the same conduct that was allowed by younger workers. McCarthy does not address this holding in her brief on appeal.

that unlawful discrimination was at least a motivating factor in the employer's actions." *Sniecinski*, 469 Mich at 133 (quotation omitted); see also *Cerutti v BASF Corp*, 349 F3d 1055, 1061 (CA 7, 2003) ("Direct evidence is evidence that, if believed by the trier of fact, would prove discriminatory conduct on the part of the employer without reliance on inference or presumption."). We address in turn McCarthy's three claims of direct evidence of discrimination.

First, the trial court held that the "old bully" comment by Sejnowski was a stray remark. Stray remarks are not evidence of a discriminatory animus. *Sniecinski*, 469 Mich at 136; see also *Krohn v Sedgwick James of Michigan, Inc*, 244 Mich App 289, 297-304; 624 NW2d 212 (2001).

> Factors to consider in assessing whether statements are "stray remarks" include: (1) whether they were made by a decision maker or an agent within the scope of his employment, (2) whether they were related to the decision-making process, (3) whether they were vague and ambiguous or clearly reflective of discriminatory bias, (4) whether they were isolated or part of a pattern of biased comments, and (5) whether they were made close in time to the adverse employment decision. [*Sniecinski*, 469 Mich at 136 n 8.]

Sejnowski called McCarthy an "old bully" in October or November 2006, at a time when she was McCarthy's supervisor. However, Sejnowski left the Chesterfield branch in November 2006, and McCarthy was not fired until March 2007. No evidence suggests that Sejnowski was involved in the decision to terminate McCarthy's employment. Although Sejnowski reviewed Cox's February 2007 performance review of McCarthy, and told Cox that she agreed with the review, Sejnowski and Cox did not discuss whether McCarthy should be fired. Sejnowski also did not participate in the discussion that ultimately led to McCarthy's termination. That discussion was between Cox, Kucinski, and West. Because the remark was not made by a person involved in the decision to terminate McCarthy's employment, Sejnowski's "old bully" remark cannot be attributed to the Credit Union. *Krohn*, 244 Mich App at 301. In addition, the phrase "old bully" is not clearly reflective of a discriminatory bias; it is vague and ambiguous. While "old" can refer to one's age, it can also mean "experienced." *Random House Webster's College Dictionary* (1992). Thus, an "old bully" can be a person of any age who has been a bully for a period of time. Under these circumstances, the trial court did not err in determining that Sejnowski's comment that McCarthy was an "old bully" was a stray comment and not direct evidence of unlawful discrimination.[3]

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[3] McCarthy argues that, during the meeting where Sejnowski called her an "old bully," Sejnowski, Cox, and Selva made other age-related "comments." However, McCarthy has never identified the substance of these comments. In opposing a motion for summary disposition, a party "must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4). By not specifying the substance of the other "comments," McCarthy cannot rely on her testimony that the three women made other comments about her age to defeat the Credit Union's motion for summary disposition.

Second, the trial court did not address West's affirmance of Sejnowski's "old bully" comment. McCarthy's brief on appeal suggests that West on two different occasions told her it was true that she was an "old bully." However, our review of McCarthy's deposition indicates that West only affirmed Sejnowski's comment one time, either in November 2006 or January 2007. Regardless of when West affirmed the "old bully" comment, West's affirmance of the comment it is not direct evidence of age discrimination. West's affirmance of the "old bully" comment was not made during the process in which the decision to terminate McCarthy's employment was made; therefore, an inference is required to conclude that a bias against McCarthy based on her age was a factor in the decision to fire her. See *Rowan v Lockheed Martin Energy Sys, Inc*, 360 F3d 544, 550 (CA 6, 2004) (the phrase "old farts" did not constitute direct evidence of a discriminatory animus because the comments were not made in relation to the decision to discharge the plaintiff and, therefore, an inference was required to establish bias); *Damon v Fleming Supermarkets of Florida, Inc*, 196 F3d 1354, 1359 (CA 11, 1999) (the decision maker's statement to the plaintiff's replacement that "the company needed young men" was not direct evidence of unlawful discrimination because the statement was made after the plaintiff was fired, requiring an inference that the decision maker's interest in promoting young workers motivated his decision to terminate the plaintiff's employment).

Third, the trial court correctly stated that West never told McCarthy that she was too old to be behind the teller line. Again, McCarthy suggests that West made this comment on more than one occasion, but our review of McCarthy's deposition indicates that West only made the challenged comment one time, in January 2007. McCarthy testified:

> *A.* Then all of a sudden I am an old bully, maybe I need to find a different position in another area, something that was slower where I could be more detail oriented, I am really good at that. But I was too old to be behind the teller line now because it's just going to get busier, Margaret, because more sales are going to be coming down the pike.
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> *Q.* Did anybody you --
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> *A.* Glenda [West].
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> *Q.* -- that you were too old to be behind the teller line?
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> *A.* They didn't say, you're too old to be on the teller line -- I am not telling you -- this is what Glenda [West] said. Margaret, I am not telling you that you need to apply for a different position but you might want to because there's going to be a lot more coming down the pike as far as sales and stuff go towards the members and younger people are more energetic. Something like that was her words and I might want to consider the position in accounting.

However, the trial court failed to consider West's statement that "younger people are more energetic," a statement that may well betray a bias by West that McCarthy, as an older woman, was less valuable or competent. Regardless, the statement was made approximately two months before McCarthy was fired. The statement was not made in the process of determining whether McCarthy's employment should be terminated. Therefore, the statement is not direct evidence of unlawful discrimination. *Rowan*, 360 F3d at 550; *Damon*, 196 F3d at 1359.

Although the trial court failed to consider all of the alleged direct evidence of discrimination, we agree with its conclusion that McCarthy failed to present any direct evidence of age discrimination. Nonetheless, the question remains whether the trial court erred in determining that McCarthy could not withstand summary disposition using circumstantial evidence and the *McDonnell Douglas*[4] burden-shifting scheme.

Under the *McDonnell Douglas* burden-shifting scheme, the plaintiff has the initial burden to establish a rebuttable prima facie case of discrimination, which includes four elements: she (1) was a member of a protected class, (2) was discharged, (3) was qualified for the position, and (4) was replaced by a younger worker. *Sniecinski*, 469 Mich at 134; *Manning v City of Hazel Park*, 202 Mich App 685, 697; 509 NW2d 874 (1993). The burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the termination. *Sniecinski*, 469 Mich at 134. If the defendant produces such evidence, the presumption of discrimination is rebutted, and the burden returns to the plaintiff to show that the defendant's reasons for the termination were not the true reasons, but a pretext for discrimination. *Id.*

The Credit Union argues that McCarthy failed to present a prima facie case of age discrimination because McCarthy was not replaced by a substantially younger worker. It is undisputed that Shanihan, who was 36 years of age, replaced McCarthy. The Credit Union claims, however, that because Shanihan only remained at the Chesterfield branch for four months and was replaced by Leslie Kitchen, who was 48 years old, McCarthy was not ultimately replaced by someone who was substantially younger. "This Court's review is limited to the record established by the trial court . . . ." *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002). The only evidence presented to the trial court was that Shanihan replaced McCarthy. There was no evidence presented regarding how long Shanihan worked at the Chesterfield branch or who replaced her after she left. Accordingly, the record does not support the Credit Union's argument.

The trial court held that McCarthy failed to present a prima facie case of age discrimination because she was not qualified for the position, an argument that the Credit Union adopts on appeal. "An employee is qualified if he was performing his job at a level that met the employer's legitimate expectations." *Town v Michigan Bell Tel Co*, 455 Mich 688, 699; 568 NW2d 64 (1997) (opinion by BRICKLEY, J.). However, as noted by other Justices, concerns about a plaintiff's job performance are more appropriately raised in the second and third steps of the *McDonnell Douglas* scheme. *Id.* at 708 (opinion by RILEY, J.), 715 (opinion by CAVANAGH, J.). A court must be careful not to conflate the distinct stages of the burden-shifting scheme. *Cicero v Borg-Warner Auto, Inc*, 280 F3d 579, 585 (CA 6, 2002). Thus, "[a] court must evaluate whether a plaintiff established his qualifications independent of the employer's proffered nondiscriminatory reasons for discharge." *Id.*

In reasoning that McCarthy was not qualified for the position, the trial court noted that McCarthy's "most recent evaluation showed that she was unable to adapt to the changes and

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[4] *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973).

took her frustrations out on members and co-workers." Thus, the trial court used the Credit Union's nondiscriminatory reason for the discharge—McCarthy's poor performance—to conclude that McCarthy was not qualified. However, McCarthy presented six performance reviews, dated from March 19, 2001, to January 23, 2006, that reflected she "effective[ly]" or "successful[ly]" performed her job duties. She also received a promotion in January 2006. This evidence, when viewed independently of the Credit Union's proffered nondiscriminatory reason for the discharge, could lead a reasonable juror to conclude that McCarthy was qualified for the position. See *Norris v State Farm Fire & Cas Co*, 229 Mich App 231, 237-238; 581 NW2d 746 (1998). The trial court erred in holding that McCarthy failed to show that she was qualified for the position.

Because McCarthy presented a prima facie case of unlawful age discrimination, the Credit Union was required to articulate a legitimate, nondiscriminatory reason for her termination. *Sniecinski*, 469 Mich at 134. This it did. It articulated McCarthy's poor performance as the reason for her discharge.

The burden then shifted back to McCarthy to show that the Credit Union's reason for her termination was not the true reason, but a pretext for discrimination. *Sniecinski*, 469 Mich at 134. A plaintiff establishes that the defendant's nondiscriminatory reason was pretext "(1) by showing the reasons had no basis in fact, (2) if they have a basis in fact, by showing that they were not the actual factors motivating the decision, or (3) if they were factors, by showing that they were jointly insufficient to justify the decision." *Feick v Monroe Co*, 229 Mich App 335, 343; 582 NW2d 207 (1998). Our Supreme Court has adopted the "intermediate position" as the appropriate summary disposition standard for discrimination cases. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 175; 579 NW2d 906 (1998) (opinion by WEAVER, J.), 185 (opinion by BRICKLEY, J.), 186 (opinion by MALLETT, C.J.). Under this standard

> disproof of an employer's articulated reason for an adverse employment decision defeats summary disposition only if such disproof also raises a triable issue that discriminatory animus was a motivating factor underlying the employer's adverse action. In other words, plaintiff must not merely raise a triable issue that the employer's proffered reason was pretextual, but that it was a pretext for age or sex discrimination. Therefore, we find that, in the context of summary disposition, a plaintiff must prove discrimination with admissible evidence, either direct or circumstantial, sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff. [*Id.* at 175-176.]

McCarthy, in arguing that the Credit Union's stated reason for her termination was pretext, relies solely on her performance reviews before Cox began working at the Chesterfield branch.[5] However, McCarthy has presented no evidence other than her own subjective belief that the October 2006 outline of the coaching session discussion, the November 2006 corrective

[5] McCarthy does not rely on West's age-related comments.

action statement, and the February 2007 performance review had no basis in fact. The fact that these three reviews were critical of McCarthy's job performance, as compared to previous reviews, which rated McCarthy's job performance effective or successful, does not indicate any animus toward McCarthy based on age. There could be numerous reasons for the change in McCarthy's performance reviews, from the legitimate, that McCarthy was no longer successfully performing her job duties, to the questionable but not unlawful, that Cox had a personality conflict with McCarthy, to the unlawful, that Cox wanted McCarthy fired because of her religion, race, or age. Even if McCarthy's job performance was not the real reason for the critical reviews, it would be nothing but speculation to conclude that McCarthy's age was the true reason for the poor reviews. Accordingly, we conclude that McCarthy has failed to raise a triable issue that the Credit Union's offered legitimate reason for her termination was a pretext for age discrimination.

Because McCarthy has failed to present any direct evidence of age discrimination and has failed to create a triable issue that the Credit Union's legitimate reason for her termination was a pretext for discrimination, we affirm the trial court's order granting summary disposition to the Credit Union on McCarthy's claim for age discrimination.

IV. RETALIATION

McCarthy claims that she presented a prima facie case of retaliation. However, in her brief on appeal, McCarthy cites no case law regarding retaliation claims. She does not even cite a case setting forth the four elements of a prima facie case of retaliation. See *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997).[6] Consequently, McCarthy has abandoned her claim that the trial court erred in granting summary disposition to the Credit Union on her retaliation claim. "An appellant may not merely announce [her] position and leave it to this Court to discover and rationalize the basis for [her] claims, nor may [she] give issues cursory treatment with little or no citation of supporting authority. Argument must be supported by citation to appropriate authority or policy." *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003) (internal citations omitted).

Affirmed. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey
/s/ Alton T. Davis

[6] McCarthy argues that "[t]he parameters for retaliation, found specifically in the *Blair* case have been fully met with testimony." However, *Blair v Henry Filters, Inc*, unpublished opinion of the Eastern District of Michigan, issued September 26, 2005 (Docket No. 04-70411), rev'd 505 F3d 517 (CA 6, 2007), did not involve a retaliation claim.